TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 249.

SIDNEY A. STOCKDALE, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

THE ATLANTIC INSURANCE COMPANY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 13, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 249.

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1 UNITED STATES OF AMERICA:

United States circuit court, fifth circuit and district of Louisiana.

ATLANTIC INSURANCE CO.,
vs.
S. A. STOCKDALE, COLL'R INT. REV. &C. } No. 6448.

Petition and affidavit for writ of certiorari.—Filed May 27th, 1871.

To the hon. the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of S. A. Stockdale, with respect, shows that he is an officer of the United States, to wit, collector of internal revenue for the first collection-district of Louisiana, duly appointed and acting under an act of Congress, entitled An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, passed 30th June, 1864, and the acts amendatory thereof; that a civil suit has been commenced against him in a court of the State of Louisiana, to wit, in the fourth district court for the parish of
2 Orleans, holding session in the city of New Orleans, by the "Atlantic Insurance Company," a corporation domiciled in New Orleans, said suit being No. 25330 of the docket of the said court, and process therein issued has been served upon petitioner in the district of Louisiana, and within the jurisdiction of this court; that no trial of the said cause has as yet been had; that the said "Atlantic Insurance Company" seeks by the said suit to recover from petitioner the sum of $3,507, which was duly assessed against it, as internal-revenue tax upon the dividends of the said company, with penalty for non-payment and costs of collection, and which was collected by your petitioner, acting in his official capacity aforesaid.

The premises considered, your petitioner prays that a writ of certiorari may issue to the said fourth district court for the parish of Orleans, requiring it to send to this hon. court the record and proceedings in the said cause, in conformity to the 67th section of the act of Congress, entitled An act to reduce internal taxation; and to amend an act entitled An act to provide internal revenue to support the Gover'ment, to pay interest on the public debt, and for other purposes, ap-
3 proved 30th June, 1864, and acts amendatory thereof, approved 13th July, 1866.

(Signed) J. R. BECKWITH,
U. S. Dist. Att'y, for Def't.

Affidavit.

S. A. Stockdale, petitioner herein, being sworn says: That all the allegations in the above petition are true to the best of his knowledge and belief.

(Signed) S. A. STOCKDALE.

Sworn to and subscribed before me this 27th day of May, 1871.

(Signed) F. B. VINOT, *D'y Clerk.*

REC. 249—1

Certificate of counsel.

I certify that, as counsel for petitioner, S. A. Stockdale, I have examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and I verily believe the same to be true.

(Signed) J. R. BECKWITH, *Att'y.*

Order.

Let a writ of certiorari issue as prayed for.
May 27th, 1871.

(Signed) E. H. DURELL, *Judge.*

4 *Writ of certiorari.*

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Circuit court of the United States for the fifth circuit and district of Louisiana.

The President of the United States of America, to the honorable the fourth district court for the parish of Orleans, holding sessions in the city of New Orleans, State of Louisiana, greeting:

Because it has been represented to us in our said court that a cause has been lately instituted and now is depending in said fourth district court, wherein the Atlantic Insurance Company is plaintiff, and S. A. Stockdale, an officer of the United States, to wit, collector of internal revenue for the first collection-district of Louisiana, is defendant, said cause being represented to us as being No. 25330 of the docket of said court, and that the said S. A. Stockdale has been served with pro-
5 cess therein issued, and because the said S. A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer as aforesaid, for and on account of an act done by him as such officer as aforesaid, under color of his said office, administering the revenue laws of the United States, and has, in due form of law, prayed of us that said suit be entered on the docket of our said court, and that the said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court, and we being willing that the same shall be done, and having ordered the said cause to be entered on the docket of our said court, where the said cause is now so docketed:

We therefore command you that you do forthwith certify to us in our said court a full record of all the proceedings had, and of record in your said court in, about, or concerning the said cause now remaining
6 in your said court, that the said cause may be proceeded in our said court as by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 27th day of May, A. D. 1871.

[SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received May 29th, 1871, and on the 31st day of May, 1871, served a copy of the within writ of certiorari on Paul E. Theard, judge of the fourth district court, by delivering the same to him personally at his courtroom in the city.

New Orleans, May 31st, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

TRANSCRIPT FROM FOURTH DISTRICT COURT, PARISH OF ORLEANS.—FILED JUNE 3D, 1871.

State of Louisiana, fourth district court for the parish of Orleans.

7 ATLANTIC INSURANCE CO. *vs.* S. A. STOCKDALE. } No. 25330.

Petition.—Filed May 20th, 1871.

To the honorable the fourth district court for the parish of Orleans:

The petition of the "Atlantic Insurance Company of New Orleans," incorporated under the laws of Louisiana, and domiciled in the city of New Orleans, in said State, respectfully shows that Sidney A. Stockdale, residing at the same place, is indebted to your petitioner in the sum of thirty-five hundred and seven dollars, ($3,507,) with interest thereon at the rate of five per cent. per annum from the 19th of November, A. D. 1870, until paid; for this, to wit: That on or about the fifth day of July, 1870, said insurance company declared a dividend of its profits amounting to the sum of sixty-six thousand dollars, ($66,000,) which was then credited to the share-holders of said company, upon their unpaid stock account; afterwards, to wit, on or about the
8 nineteenth day of November, 1870, said Sidney A. Stockdale, defendant, being collector of United States internal revenue for the first collection-district of Louisiana, did, then and there, wrongfully and illegally, demand from your petitioner the sum of thirty-three hundred dollars, as an alleged tax, which he claimed was due the United States by reason of an assessment (by B. F. Joubert, esqr., assessor of United States internal revenue for said district) of five per cent. upon said dividend of said company, so as aforesaid declared, and the further sum of one hundred and sixty-five dollars, as a penalty for non-payment of said alleged tax upon previous demand, and thirty-three dollars interest, and nine dollars fees alleged by said defendant to have accrued, making a total of thirty-five hundred and seven dollars, so as aforesaid, wrongfully and illegally demanded; and your petitioner, then and there protesting, through the proper officer of said company, against said payment and 'gainst said assessment, as wrongfully and illegal,
9 paid the sum aforesaid to said defendant, on or about the day last aforesaid.

Your petitioner avers that the said assessment and collection of the said sum of money—alleged to be a tax—penalty, interest, and fees, was wholly without warrant or authority in law.

Your petitioner avers that said company has, "according to the provisions of law in that regard, and the regulations of the Secretary of

the Treasury, established in pursuance thereof," appealed to the Commissioner of Internal Revenue for, and demanded, the refunding and return to it of said sum of money so, as aforesaid, wrongfully and illegally demanded and collected from your petitioner by said defendant, and said Commissioner has rejected said claim, and six months has not elapsed since his decission thereon.

Wherefore your petitioner prays that said Sidney A. Stockdale be cited to answer this demand, and that, after due proceedings had, your petitioner do have judgment and recover from said defendant the said sum of thirty-five hundred and seven dollars, with interest at the
10 rate of five per cent. per annum from the nineteenth day of November, 1870, until paid, and costs of suit. And your petitioner prays for general relief.

(Signed) T. GILMORE AND CASE & ROUSE,
Att's for Petitioner.

Citation.—Issued May 21st, 1871.

THE ATLANTIC INSURANCE CO. *vs.* S. A. STOCKDALE. } No. 25330.

State of Louisiana, fourth district court for the parish of Orleans, in the city of New Orleans.

Mr. S. A STOCKDALE, *New Orleans:*

You are hereby summoned to comply with demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fourth district court for the parish of Orleans, in ten days after the service hereof.

11 Witness the honorable Paul E. Theard, judge of the said court, the twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-one.

D. E. SEGHERS, *D'y Clerk.*

Sheriff's return.

And on the twenty-fourth day of same month and year I served a copy of the within citation and accompan'ing petition on S. A. Stockdale in person.

M. FIORATTI, *D'y Sh'ff.*

Writ of certiorari.—Filed May 31st, 1871.

U. S. circuit court.

ATLANTIC INSURANCE CO. *vs.* S. A. STOCKDALE, COLL. INT. REV. &C. } No. 6,448.

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Circuit court of the United States for the fifth circuit and district of Louisiana.

12 The President of the United States of America to the honorable the fourth district court for the parish of Orleans, holding sessions in the city of New Orleans, State of Louisiana, greeting:

Because it has been represented to us in our said court, that a cause has been lately instituted and now is depending in said fourth district court, wherein the Atlantic Insurance Company is plaintiff, and S. A. Stockdale, an officer of the United States, to wit, collector of internal revenue for the first collection-district of Louisiana, is defendant, said cause being represented to us as being N°. 25330, of the docket of said court, and that the said S. A. Stockdale has been served with process therein issued, and because the said S. A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer, as aforesaid, for and on account of an act done by him as such officer, as aforesaid, under color of

13 his said office, administering the revenue laws of the United States, and has in due form of law prayed of us that said suit be entered on the docket of our said court, and that the said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court, and we being willing that the same shall be done, and having ordered the said cause to be entered on the docket of our said court where the said cause is now so docketed:

We, therefore, command you that you do forthwith certify to us in our said court, a full record of all the proceedings had and of record in your said court, in, about, or concerning the said cause now remaining in your said court, that said cause may be proceeded in in our said court as by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of May, A. D. one thousand eight hundred and seventy-one.

14 (Signed) D. URBAN, *Clerk.*
(Signed) By F. B. VINOT, *D'y Clerk.*

Certificate.

Pursuant to the writ of certiorari herein, I, George P. Fernald, clerk of the fourth district court for the parish of Orleans, hereby certify that the above and foregoing nine pages do contain a full, correct, and complete transcript of the record, including all proceedings had, docu. filed in the cause wherein the Atlantic Insurance Company are plaintiffs, and S. A. Stockdale is defendant; which said cause was instituted in our said court on the twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-one, under the No. 25330.

In testimony whereof I hereunto set my hand and affix the seal of said court at the city of New Orleans, on the second day of June, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-fifth year of the Independence of the United States.

[SEAL.] (Signed) GEORGE P. FERNALD, *Clerk.*

15 *Answer.—Filed June 19th*, 1871.

Circuit court of the United States, district of Louisiana.

ATLANTIC INSURANCE COMPANY
vs.
S. A. STOCKDALE, COLLECTOR INTERNAL REV., &c. } No. 6448. Answer.

And now comes the said defendant and admits that he is collector of internal revenue, as in said plaintiff's petition charged; but for answer

to all other parts and portions of said petition, denies all and singular the allegations therein contained, and prays judgment against said plaintiff, with costs and general relief.

(Signed) J. R. BECKWITH,
U. S. Att'y, for Def't.

Statement of facts.—Filed April 15th, 1872.

Circuit court of the United States, district of Louisiana.

THE ATLANTIC INSURANCE COMPANY OF NEW Orleans
vs.
SIDNEY A. STOCKDALE, COLLECTOR OF INTERnal revenue.
} No. 6448. Statement of facts.

16 And afterwards, on the of the November term of said court, A. D. 1871, in open court, came as well the said plaintiff, by Thomas Gilmore, esq., and Mess. Case and Rouse, its attorn'ys, as the said defendant, by J. R. Beckwith, U. S. attorn'y, and, having waived a trial by jury, agreed upon and submitted to the court the following statement of the facts involved in this cause; that is to say:

1st. That the plaintiff is a body-corporate, as set forth in plaintiff's petition, duly created by the laws of the State of Louisiana, domiciled in the said State, and since the first of January, 1868, has, as such corporation, prosecuted and carried on the business of fire and marine insurance in the city of New Orleans.

2d. That the shares of the capital stock of said corporation, or as to each and every of said shares, is in part paid in in cash, and in part by the individual notes of the respective shareholders, which said promissory notes are in this statement refer'ed to as stock-notes, all of which said stock-notes are held by said corporation as a portion of the assets.

3d. That on the 5th day of July, A. D. 1870, the said corpora-
17 tion, plaintiff, declared a dividend of the earnings which had accrued to said corporation between the fifth day of July, A. D. 1869, and the 30th day of June, A. D. 1870, amounting to the gross sum of sixty-six thousand dollars, which said sum was at once, on the said 5th day of July, 1870, credited pro rata to the several shareholders of said corporation upon their unpaid stock-notes, the said corporation deducting an amount from said dividend for internal-revenue tax of the United States, a sum amounting to five per centum of said sixty-six thousand dollars, to wit, thirty-three hundred dollars, which said last sum is still held by said plaintiff undivided and undistributed pending this suit; and on the 13th day of September, A. D. 1870, made a return of said dividend to and upon demand of B. F. Joubert, assessor of internal revenue for the first collection-district of Louisiana, in due form, the plaintiff at the same time denying its liability to make such return, or pay any tax.

4th. That B. F. Joubert, assessor of United States internal rev-
18 enue for the first collection-district of Louisiana, assessed against said plaintiff, on alleged internal-revenue tax upon said dividend, at the rate of five per centum thereon, amounting to the sum of thirty-three hundred dollars, and returned the same upon his monthly list of assessment for the month of August, 1870, to said defendant, collector of internal revenue in and for said collection-district, for collection.

5th. That said defendant, collector as aforesaid, demanded the payment of the said sum so assessed as aforesaid from the said plaintiff. Said plaintiff refused to comply with said demand. Whereupon the said defendant, as collector as aforesaid, issued his warrant for the collection thereof, by distraint, with the addition of a penalty of five per centum on the amount so assessed against said plaintiff, and interest at the rate of one per centum per month upon the amount of said alleged tax, and caused the property of plaintiff to be distrained and seized, and threatened to sell the same to make the sum necessary to pay the said alleged tax, penalty, and interest. And thereupon the said plaintiff, on
19 the 19th day of November, A. D. 1870, protesting against the legality of said assessed tax, and denying that any tax was due the United States on account of, or by reason of, said dividend from said corporation, the plaintiff paid to said defendant, collector as aforesaid, the sum demanded as such tax, to wit, the sum of thirty-three hundred dollars, together with the sum of one hundred and sixty-five dollars, alleged penalty, and thirty-three dollars as interest, and nine dollars costs, amounting to the sum of thirty-five hundred and seven dollars, all of which said several sums of money were respectively paid under protest.

That the said plaintiff, according to provisions of law in that regard, and the regulation of the Secretary of the Treasury, established in pursuance thereof, then in force, appealed to the Commissioner of Internal Revenue, and demanded the refunding and return to the plaintiff of the said sum of thirty-five hundred and seven dollars, so paid to said defendant as aforesaid; that the said Commissioner rejected said appeal, and refused to allow said money to be refunded to said plaintiff on the
20 6th day of April, 1871, less than six months prior to the commencement of this action, which was instituted within one year from the date of the payment of said money to said defendant, collector.

That all of the said sums of money, so paid by the said plaintiff to the said defendant, collector, as *as* aforesaid, except the sum of nine dollars collected as costs, have, in the due and regular course of business, in the office of said defendant, been paid into the Treasury of the United States.

And having so agreed upon said facts as herein stated, the said plaintiff and the said defendant, by their said respective attorneys, did then and there respectively pray the judgment of the court in the premises.

(Signed) CASE & ROUSE,
Att'ys for Pff.

(Signed) J. R. BECKWITH,
U. S. Att'y for Def't.

Order: Continuance.—Extract from minutes, April 15th, 1872.

ATLANTIC INSURANCE CO. vs. S. A. STOCKWELL. } No. 6448.

21 The counsel in the above case having filed statements of facts, it was ordered that the matter be argued on to-morrow at 11 a. m.

Submission of cause.—Extract from minutes April 16th, 1872.

ATLANTIC INSURANCE CO. vs. S. A. STOCKDALE. } No. 6448.

The above cause came up for trial before the court, the parties having in writing waived the jury.

And after hearing the argument of counsel on both sides the court took time to advise.

Judgment, from judgment-book.

Circuit court of the United States, fifth circuit and district of Louisiana, April term, 1872.

NEW ORLEANS, *Wednesday May 1st*, 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

ATLANTIC INS. CO. vs. S. A. STOCKDALE. } No. 6448.

22 For the reason assigned in the written opinion of the court, this day delivered and on file, in the case of the Home Mutual Insurance Co. vs. this defendant, No. 6525 of the docket, it is ordered, adjudged, and decreed that the plaintiff, the Atlantic Insurance Company, do recover from the defendant, Sidney A. Stockdale, the sum of three thousand five hundred and seven dollars, with 5 % interest from 19th November, 1870, till paid, and costs of suit.

And it further appearing that the defendant is collector of internal revenue for the first collection-district of Louisiana, and that this action was brought against the said defendant in his official character and capacity for money paid to him and by him into the Treasury of the United States in the performance of his official duty as such collector of internal revenue, and that he had reasonable and probable cause for collecting from said plaintiff the said money now recovered back from him by the aforesaid judgment:

It is therefore further ordered that no execution or other writ
23 for the enforcement of the judgment issue against the said defendant, but that the same be provided for and paid out of the proper appropriation from the Treasury, as provided by law in such cases.

Judgment rendered May 1st, 1872.
Judgment signed May 6th, 1872.
(Signed) E. H. DURELL, *Judge.*

24 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 23 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of The Atlantic Insurance Company

of New Orleans vs. S. A. Stockdale collector int. rev., &c., No. 6448 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21 day of October, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Frances A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21 day of October, A. D. 1872.

E. H. DURELL, *Judge.*

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between The Atlantic Insurance Company of New Orleans, plaintiff, and Sidney A. Stockdale, collector of United States internal revenue in & for the first collection-district of Louisiana, defendant, a manifest error hath happened, to the great damage of the said Sidney A. Stockdale, defendant, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 24th day of April, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6448. Sidney A. Stockdale, pl'ff in error, versus The Atlantic Insurance Company of New Orleans, def't in error. Writ of error. Filed May 13th, 1872. F. A. Woolfley, clerk.

REC. 249—2

THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to The Atlantic Insurance Company of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Sidney A. Stockdale, collector of United States internal revenue in & for the first collection-district of Louisiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

27 (Indorsed:) United States circuit court. No. 6448. Sidney A. Stockdale, plaintiff in error, vs. The Atlantic Insurance Company of New Orleans, defendant in error. Citation.

Marshal's return.

Received May 14, '72, by the U. S. marshal, and on the same day, month, and year served a copy of within citation of appeal personally on H. P. Janvier, vice-president of the Atlantic Insurance Company of New Orleans, the president of said company being temporar'ly absent.

New Orleans, June the 24, 1872.

S. W. REED,
D'y U. S. Marshal.

On this 24th day of June, 1872, personally appeared before me, the subscriber, S. W. Reed, & makes oath that he delivered a true copy of the within citation as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn & subscribed before me—

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 249. Sidney A. Stockdale, collector of internal revenue, plaintiff in error, vs. The Atlantic Insurance Company of New Orleans. Louisiana C. C. U. S. Filed 13th November, 1872.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE ATLANTIC INSURANCE COMPANY OF NEW ORLEANS,
AND THIRTEEN OTHER CASES.

No. 249.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE ATLANTIC INSURANCE COMPANY OF NEW ORLEANS.
No. 249.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE CITIZENS' BANK OF LOUISIANA.
No. 267.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE NEW ORLEANS CANAL AND BANKING COMPANY.
No. 268.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE ORLEANS RAILROAD COMPANY.
No. 269.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE CRESCENT CITY RAILROAD COMPANY.
No. 270.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE VALETTE DRY-DOCK COMPANY.
No. 271.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE HOME MUTUAL INSURANCE COMPANY.
No. 272.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE NEW ORLEANS MUTUAL INSURANCE COMPANY.
No. 273.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE UNION INSURANCE COMPANY OF NEW ORLEANS.
No. 274.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE MERCHANTS' MUTUAL INSURANCE COMPANY.
No. 275.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE GERMANIA INSURANCE COMPANY OF NEW ORLEANS.
No. 276.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE SUN MUTUAL INSURANCE COMPANY OF NEW ORLEANS.
No. 277.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
THE UNION NATIONAL BANK OF LOUISIANA.
No. 278.

S. A. STOCKDALE, *Collector, &c., Plaintiff in Error,*
vs.
WM. E. SHROPSHIRE AND OTHERS, *Liquidating Commissioners of the Pelican Insurance Company.*
No. 279.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR THE PLAINTIFF IN ERROR.

These are actions commenced in a State court of Louisiana by petition of the defendants in error against the plaintiff in error, as collector of internal revenue, seeking the repayment of a tax alleged to have been illegally assessed and collected, being five *per centum* upon certain dividends, and also a penalty, &c., which, upon application by the collector, were transferred to the United States circuit court for the district of Louisiana, and answers having been filed denying all and singular the allegations of the petition, judgment was afterwards rendered in each case, at April term, 1872, against the plaintiff in error.

In each case a statement of facts was agreed upon by the attorneys for the parties; that in No. 249 (pp. 6, 7) being as follows:

"And afterwards, on the —— of the November term of said court, A. D. 1871, in open court, came as well the said plaintiff, by Thomas Gilmore, esq., and Mess. Case and Rouse, its attorn'ys, as the said defendant, by J. R. Beckwith, U. S. attorn'y, and, having waived a trial by jury, agreed upon and submitted to the court

the following statement of the facts involved in this cause; that is to say:

"1st. That the plaintiff is a body-corporate, as set forth in plaintiff's petition, duly created by the laws of the State of Louisiana, domiciled in the said State, and since the first of January, 1868, has, as such corporation, prosecuted and carried on the business of fire and marine insurance in the city of New Orleans.

"2nd. That the shares of the capital stock of said corporation, or as to each and every of said shares, is in part paid in in cash, and in part by the individual notes of the respective shareholders, which said promissory notes are in this statement referred to as stock-notes, all of which said stock-notes are held by said corporation as a portion of the assets.

"3rd. That on the 5th day of July, A. D. 1870, the said corporation, plaintiff, declared a dividend of the earnings which had accrued to said corporation between the fifth day of July, A. D. 1869, and the 30th day of June, A. D. 1870, amounting to the gross sum of sixty-six thousand dollars, which said sum, was at once, on the said 5th day of July, 1870, credited *pro rata* to the several shareholders of said corporation upon their unpaid stock-notes, the said corporation deducting on amount from said dividend for internal revenue tax of the United States, a sum amounting to five per centum of said sixty-six thousand dollars, to wit, thirty-three hundred dollars, which said last sum is still held by said plaintiff undivided and undistributed pending this suit; and on the 13th day of September, A. D. 1870, made a return of said dividend to and upon demand of B. F. Joubert, assessor of internal revenue for the first collection district of Louisiana, in due form, the plaintiff at the same time denying its liability to make such return, or pay any tax.

"4th. That B. F. Joubert, assessor of United States internal revenue for the first collection district of Louisiana, assessed against said plaintiff, on alleged internal revenue tax upon said dividend, at the rate of five per centum thereon, amounting to the sum of thirty-three hundred dollars, and returned the same upon his

monthly list of assessment for the month of August, 1870, to said defendant, collector of internal revenue in and for said collection district, for collection.

"5th. That the said defendant, collector as aforesaid, demanded the payment of the said sum so assessed as aforesaid from the said plaintiff. Said plaintiff refused to comply with said demand. Whereupon the said defendant, as collector as aforesaid, issued his warrant for the collection thereof, by distraint, with the addition of a penalty of five per centum on the amount so assessed against said plaintiff, and interest at the rate of one per centum per month upon the amount of said alleged tax, and caused the property of plaintiff to be distrained and seized, and threatened to sell the same to make the sum necessary to pay the said alleged tax, penalty, and interest. And, thereupon, the said plaintiff, on the 19th day of November, A. D. 1870, protesting against the legality of said assessed tax, and denying that any tax was due the United States on account of, or by reason of said dividend, from said corporation, the plaintiff paid to said defendant, collector as aforesaid, the sum demanded as such tax, to wit, the sum of thirty-three hundred dollars, together with the sum of one hundred and sixty-five dollars, alleged penalty, and thirty-three dollars as interest, and nine dollars costs, amounting to the sum of thirty-five hundred and seven dollars, all of which said several sums of money were respectively paid under protest.

"That the said plaintiff, according to provisions of law in that regard, and the regulation of the Secretary of the Treasury, established in pursuance thereof, then in force, appealed to the Commissioner of Internal Revenue, and demanded the refunding and return to the plaintiff of the said sum of thirty-five hundred and seven dollars, so paid to said defendant as aforesaid; that the said Commissioner rejected said appeal, and refused to allow said money to be refunded to said plaintiff on the 6th day of April, 1871—less than six months prior to the commencement of this action, which was instituted within one year from the date

of the payment of said money to said defendant, collector.

"That all of the said sums of money, so paid by the said plaintiff to the said defendant, collector, as aforesaid, except the sum of nine dollars collected as costs, have, in the due and regular course of business in the office of said defendant, been paid into the Treasury of the United States.

"And having so agreed upon said facts as herein stated, the said plaintiff and the said defendant, by their said respective attorneys, did then and there respectively pray the judgment of the court in the premises."

In each of the other cases a similar statement was filed, differing from the above only in this, that generally the dividends had been *paid* without deducting the tax, and also in regard to the following minor particulars:

Thus, in No. 267, the defendant in error is a bank, and the fund taxed, a dividend of earnings made between August 1, 1869, and January 31, 1870, declared January 3, 1870, payable second Monday in February, 1870.

In No. 268, the defendant in error is a bank, and the fund, a dividend of earnings between July 1, 1869, and December 31, 1869, declared December 27, 1869, and paid January 3, 1870.

In No. 269, the defendant in error is a railroad company; the fund, a dividend of earnings between July 4, 1868, and December 31, 1870, (?) declared January 11, 1870, payable February 15, 1870. [December 31, 1870, above, seems to be a clerical error for December 31, 1869, as appears from the time when the dividend was declared and paid.]

In No. 270, the defendant in error is a railroad company; the fund, a dividend of earnings between January 1, 1869, and December 31, 1869, declared January 12, 1870, payable January 25, 1870; also. dividends of earnings between February 1, 1870, and July 31, 1870, declared July 13, 1870, payable July 25, 1870.

In No. 271, defendant's business was that of docking and repairing vessels; the fund, a dividend of earnings and surplus fund made between January 1, 1869, and December 31, 1869, declared January 14, 1870, payable February 1, 1870.

[This defendant is not one of the corporations mentioned in sections 120 and 122 of the act of 1864, and it seems therefore that the writ of error cannot be maintained. Upon application to the Commissioner of Internal Revenue, we learn that the tax in this case ($595) has been refunded to the defendant, as appears by its receipt of August 1, 1873, on file in that office.]

In No. 272, the defendant in error is an insurance company; the fund, a dividend of earnings for the year 1869, declared January 17, 1870, payable March, 15, 1870.

In No. 273, the defendant in error is an insurance company; the fund, a dividend of earnings for the year 1869, declared January 13, 1870, payable March 1, 1870.

In No. 274, the defendant in error is an insurance company; the fund, a dividend of earnings and surplus fund, made between the 1st of May, 1869, and the 30th of April, 1870, declared May 11, 1870, the dividend then payable.

In No. 275, defendant in error is an insurance company; the fund, a dividend and surplus fund made between the 1st of June, 1869, and the 31st of May, 1870, the dividend declared June 3, 1870, payable August 1, 1870.

In No. 276, defendant in error is an insurance company; the fund, a dividend and surplus fund made between March 30, 1869, and March 30, 1870, declared March 31, 1870, the dividend then payable.

In No. 277, the defendant in error is an insurance company; the fund, a dividend and surplus fund made during the year 1869, declared January 19, 1870, payable March 21, 1870.

In No. 278, the defendant in error is a bank; the fund, a dividend made between the 1st of August, 1869, and the 31st of January, 1870, declared January 21, 1870, payable February 7, 1870.

In No. 279, the defendants in error are commissioners of an insurance company in liquidation; the fund, a dividend of earnings for 1869, declared January 10, 1870, payable March 1, 1870.

Of the above cases the funds in Nos. 268, 272, 273, 277, and 279, and probably 269, are earnings made previously to the 31st of December, 1869. So, also, is the first dividend in No. 270; the second dividend in that case being for part of the year, 1870. In Nos. 249, 267, 274, 275, 276, and 278, the earnings extend over parts of both years.

We assign for error in the cases severally, the judgment of the court that no part of the dividends in question is liable to taxation.

We submit, in each case, that the whole of the dividends is so liable, or, at all events, so much thereof as is due to *gains* made in the year 1869.

An important inquiry involved in these cases is, whether the provision in the act of 1864, ch. 173, sec. 119, (13 Stat., 283,) which limits "the duty herein imposed" to a period closing with the year 1869, applies to the duties upon dividends, &c., imposed in sections 120 and 122 of the same act; and if this be so, whether section 17 of the act of 1870, ch. 255, (16 Stat., 261,) which purports to *construe* the above act, and thus to *decide* that it imposes the duty until August, 1870,—supposing it incompetent to *construe* such act for any past transaction, fails also to levy such tax *proprio vigore*.

If we succeed in maintaining the negative of either of these propositions, we shall show error in the judgment below for the whole amount in every case.

Supposing the court to take a special view of the principle involved, and to hold that, although the corporation is the real tax-payer, still the limitation of the tax to the period closing with the year 1869 applies to it as well as to other persons, and that the act of 1870 does not act *proprio vigore*, as above suggested, then there is error still in each case although only for a part of the judgment.

We rely very much upon the Opinions filed by the court in the Barnes cases at the last term, which, *in form*, cover entirely the facts presented in Nos. 268, 272, 273, 277, 279, and probably 269; and, *in principle*, as we apprehend, cover entirely all the cases. The Barnes cases were recognized to be of very great importance, and were twice argued before the court, and very closely considered.

Inasmuch as, in the interval, there has been some change in the court, and those cases are questioned by the defendants here, we ask leave to submit, in addition to the opinions themselves, some few reasons why the decisions should be approved and extended to all the questions now before the court.

We will endeavor to maintain the following propositions in the order in which they occur:

1. The statutory provisions in question regard the corporation, *not* the shareholders, as tax-payer.

2. Among the differences between the tax upon corporations and that upon other persons is this, that the latter was first made *temporary* by the act of July, 1870.

3. Revenue laws which levy a tax upon the whole income of a particular year, even although passed in the latter part of such year, are not obnoxious to judicial censure as *retrospective* legislation.

4. There being expressed in the words of the 17th section of the act of July, 1870, a plain intention of Congress that dividends, &c., for the year 1870 up to the month of August, should be taxed at a specified rate and by certain methods, even although that act

cannot be supported as *construing* the act of 1864 for any period anterior to July, 1870, yet it will take effect as *of itself* levying the tax upon the income of the passing year up to that date.

I.

The statutory provisions in question regard the corporation, *not* the shareholders, as tax-payer.

These provisions are contained in section 9 of the act of July 13, 1866, (14 Stat., 138,) as amending sections 120 and 122 of the act of June 3, 1864, (13 Stat., 283, 284;) together with section 17 of the act of July 14, 1870, (16 Stat., 261,) and are as follows:

1. "That section one hundred and twenty be amended by striking out all after the enacting clause, and inserting in lieu thereof the following: That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid,

the said tax of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default, shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable, nor shall the portion of premiums returned by mutual life insurance companies to their policy holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends." (14 Stat., p. 138.)

"That section one hundred and twenty-two be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due

or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of the law in other cases of

neglect or refusal: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall, in fact, fail to pay such interest, that in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness." (14 Stat., 138.)

2. "That sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three, of the act of June thirty, eighteen hundred and sixty-four, entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' as amended by the act of July thirteen, eighteen hundred and sixty-six, and the act of March two, eighteen hundred and sixty-seven, shall be construed to impose the taxes therein mentioned to the first day of August, eighteen hundred and seventy, but after that date no further taxes shall be levied or assessed under said sections; and all acts and parts of acts relating to the taxes herein repealed, and that all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures, incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved. And for carrying out and completing all proceedings which have been already commenced or that may be commenced to enforce such fines, penalties, and forfeitures, or criminal proceedings under said acts, and for the punishment of crimes of which any party shall be or has been found guilty. (16 Stat., 261.)

In the original act of June, 1864, sections 120 and 122, thus amended, were immediately preceded by other sections which dealt with taxation upon incomes

in general, and substantially as follows: *Section* 116 levied annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, however such gains might have been derived, "*except* as hereinafter mentioned," if such gains exceeded $600, a duty of 5 per centum on the excess beyond $600 not exceeding $5,000, and one of 7½ per centum on the excess over $5,000 not exceeding $10,000, and of 10 per centum on the excess over $10,000, such duty to be assessed, collected, &c., upon the gains, &c., for the year ending December 31 next before the time of levying &c.; *section* 117 contains the *exception* above mentioned, which, so far as is here material, is of the "income derived from dividends on shares in the capital stock of any bank, trust company, savings institution, insurance, railroad, canal, turnpike, canal navigation, or slackwater company," which shall have been assessed and the tax paid as hereinafter provided; *section* 118 provides methods for regulating and enforcing *returns* of the income before mentioned; and *section* 119 provides, so far as is here material, "That the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the 30th day of June, in each year, until and including the year 1870, and no longer."

The recent history of this species of taxation by the United States begins with the act of August 5, 1861, (12 Stat., 309,) which herein is confined to a single, simple, and comprehensive provision intended to in-

clude by a few exhaustive words all incomes of all sorts which citizens might receive. Probably these provisions were evaded, for an act was passed in the next year, that of July 1, 1862, (12 Stat., 432,) which is much more elaborate, and originated in general the method of taxation the effect of which is now under consideration. (See *Ibid.*, p. 469, &c.) Then follow the acts first above mentioned, and also one passed in 1865, (13 Stat., 479,) which requires no further notice here.

The differences between the tax upon *dividends*, &c., and that upon ordinary *income*, apparent on the face of the statute, in addition to the fact that the former is, in terms, laid upon corporations, and the latter upon shareholders, are, amongst others—

1. The former is a uniform tax for all amounts, whilst the latter increases, with the income, by a sliding scale.

2. The former contains no exemption, whilst the latter does.

3. The former is semi-annual, the latter an annual tax.

4. In case the tax upon the *dividends* were not *paid* by the bank, section 117 required it of the stockholder as upon *income;* but in that case it might assume a shape substantially different: for instance, if a man's receipts for 1864 were $5,600 of ordinary income, and $10,000 of dividends, &c., in case the tax upon the latter were paid by the corporation, the public charge coming out of the owner was five per cent. upon $15,000, that is, $750; but if the coporation had not paid its share

of the tax, the income tax assessed against the owner was five per cent. upon the first $5,000, 7½ per cent. upon the second, and 10 per cent. upon the third; that is, in all $1,125. But in such a case, if his ordinary *income* were nothing whilst his *dividends* were $1,000, his charges, in the first case, were $50, and, in the latter, $20.

The above differences occur in the original act of 1862, (12 Stat., 470–472,) and are preserved substantially through all subsequent variations of statutory provisions upon the subject.

5. The former tax is due from aliens, (14 Stat., 138;) the latter is not, (13 Stat., 281.)

6. The act of 1870, which is pertinent where we are inquiring into the views of the legislature upon this point, levied for the years 1870 and 1871 an annual tax of 2½ per cent. upon all ordinary income *over* $2,000, whilst it fixed the dividend tax at five per cent. up to August, 1870, and 2½ per cent. thereafter, *without exemption*. There is some question as to the rate at which it fixed the latter tax; that is, whether the 2½ per cent. after August were to be laid upon gains, &c., made before the beginning of 1871. But there can be no difference of opinion as to the contrast exhibited there between the tax laid upon incomes, and that upon dividends.

II.

Among the differences between the tax upon corporations and that upon other persons, is this: that the latter was first made temporary by the act of July, 1870.

We have enumerated above several differences, about which there can be no dispute. The present difference is placed by itself because it goes to the very foundation of the present issue. The fact that there exists other substantial differences, prepares the way in some degree for the establishment of the existence of this; at least shows that its existence, if proved, is no anomaly.

The provision relied upon as showing the contrary, is that already cited from the act of 1864, section 119, viz., "the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year eighteen hundred and seventy, and no longer." (13 Stat., 283.)

Up to that point, the act had treated of income other than that now under consideration. In the 119th section no duties are imposed. There can be no doubt that the expression "duties on incomes *herein* imposed" includes ordinary incomes. Does it also include dividends?

It is to be observed, that the limitation is attached to the *levy*, not to the *duty*. The duty is made temporary only *indirectly*, that is, because the method of collecting is only temporary. This method is a special one, not applicable to *dividends*. It seems that no way of rendering the limitation applicable to other sorts of income can be devised which will not amount substantially to holding that the language above quoted is to be read "the duties on incomes herein imposed shall continue until, and including the year 1870, and no longer." In such case, the taxes upon

all sorts of incomes would have remained during the period now in controversy. Indeed, one cannot help suspecting that the limitation was intended to attach to the duty, and not to the time of levying it. The draughtsman of the act naturally adverted to the principal thing, and not to the mere incident. If the precision of the language forbids such interpretation, it is for reasons which forbid, *a fortiori*, the application of the limitation to other income having no connection with the thing selected by the draughtsman as the subject of the limitation.

In such case, the tax upon dividends, &c., was left by the legislature, inadvertently or otherwise, in a permanent shape, until the passage of the act of 1870.

III.

Revenue laws which levy a tax upon the whole income of a particular year, even although passed in the latter part of such year, are not obnoxious to judicial censure as *retrospective* legislation.

We mean that it is usual for revenue laws to have such operation; upon the ground perhaps that income is to be treated as *in fieri* until the close of the year.

For illustration we need only cite the laws now under consideration. The acts of August 5, 1861, July 1, 1862, June 30, 1864, July 13, 1866, and July 14, 1870, either originated or increased taxes upon incomes for those respective years.

IV.

There being expressed in the words of the 17th section of the act of July, 1870, a plain intention of the legislature that dividends, &c., for the year 1870, up to the month of August, should be taxed at a specified rate and by certain methods, even although that act cannot be supported as *construing* the act of 1864, for any period anterior to July, 1870, yet it will take effect as of itself levying such tax upon the income of the passing year up to that date.

We claim that the maxim *Quando res non valet ut ago valeat quantum valere potest*, is applicable in this case, and with the effect above mentioned.

Such seems to be the ordinary rule in cases of statutes which declare the meaning of former statutes.

In the case of the Postmaster *vs.* Early, 12 Wheat., 126, the words of the statute under consideration were "the district court shall have cognizance, concurrent with the courts and magistrates of the several States, and the circuit court of the United States, of all suits," &c. Here the legislature was assumed merely to have expressed an *opinion* that the *circuit courts* already had the jurisdiction which they were conferring upon the *district courts*. The Supreme Court held this *opinion* to be a mistaken one, but said that, notwithstanding the section was not framed with the intention of vesting jurisdiction in the circuit courts, it had that effect as to the future, and that the law expressed the sense of the legislature on the existing law as plainly as a

declaratory act and expressed it in terms capable of conferring jurisdiction.

In McCabe *vs.* Emerson, 6 Harr., (Pa.,) 111, a statute provided "that no act heretofore passed shall be *so construed* as to prevent either party in a cause from obtaining," &c. The court, holding it to be unconstitutional as to past matters, said, "so far as regards future cases, it is agreed there is no difficulty."

Now, it seems plain that the legislature, by saying in July, 1870, that certain previous acts shall be construed to impose the taxes therein mentioned up to the first day of August, 1870, has expressed its intention in favor of the imposition of such tax. Why, then, may it not be effective as of itself laying such tax? Attention has been called above to the rule allowing taxation upon incomes for a year already current and somewhat advanced when the act is passed. If it would have been competent for Congress in July, 1870, to lay an income tax for the whole of that year by any language which it could command, why, under the maxim quoted above, does not *this* language, which conveys its views and wishes in detail, have that effect?

If the court shall agree with us upon this single point, all other considerations advanced in this brief may be laid aside. For the purposes of *this* argument, we may admit that the tax is in no way to be distinguished from income tax upon individuals. The only objections to the argument that occur to us, proceed from distinctions to be drawn between this and ordinary income, and such objections can prevail here only with the consequence of giving force to the consid-

erations already presented by us in behalf of such distinction.

If all mere formalities are to be discarded, and the question viewed only in its effects upon the ultimate owner of the property, there can be no reason why this act of 1870 does not impose the tax. If the act of 1870 be held not to impose such tax, it seems that this must be because of such a deference to formalities as warrants positions taken by us in other parts of this brief.

G. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

Supreme Court of United States.

No. 249.

SIDNEY A. STOCKDALE, Collector of Internal Revenue,
Plaintiff in Error,

VERSUS

THE ATLANTIC INSURANCE COMPANY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES CASE,
Counsel.

J. D. ROUSE,
Attorney.

CLARK & HOFELINE, BOOK PRINTERS, 9 BANK PLACE.

Supreme Court of United States.

No. 249.

SIDNEY A. STOCKDALE, COLLECTOR OF INTERNAL REVENUE,
Plaintiff in Error,

VERSUS

THE ATLANTIC INSURANCE COMPANY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the District of Louisiana.

Brief for Defendant in Error.

This suit was brought by the defendant in error—plaintiff below—to recover money paid to the plaintiff in error, collector of internal revenue, as taxes, penalty, interest, etc., upon a certain dividend declared by said Company the 5th day of July, 1870.

A jury was waived, and the facts agreed upon substantially as follows:

The plaintiff below was a corporation engaged in the business of fire and marine insurance. A portion of its capital had been paid in, and the balance was represented by stock-notes given by its shareholders. Upon the 5th day of July, 1870, the corporation declared a dividend

out of the earnings which had accrued to it from July 5th, 1869 to June 30th, 1870, amounting to the sum of sixty-six thousand dollars, which dividend was credited to the shareholders upon their unpaid stock notes, less five per centum, retained undistributed pending this suit. Upon this dividend the assessor assessed a tax of five per centum, amounting to the sum of thirty-three hundred dollars. The plaintiff in error, demanded payment of said tax, which was refused; and thereupon he distrained and seized the property of said Insurance Company and was about to sell the same, when the Company paid under protest, the said tax, penalty, interest, and costs, amounting to the sum of thirty-five hundred and seven dollars: the Company appealed to the Commissioner to refund the same, which appeal was rejected, and this suit brought within the time limited.

Upon these facts the Circuit Court gave judgment in favor of the Insurance Company.

We assert the correctness of that judgment, and in support thereof maintain the following propositions of law:

I.

The tax of five per centum imposed upon the dividends of Insurance Companies by section 120 *of the act of June* 20, 1864, *as amended July* 13, 1866, *is a tax upon the income of the Stockholder, and not a tax upon the Corporation.*

In this case the validity of the tax is sought to be maintained under the provisions of section 120, act of June 30, 1864, as amended July 13, 1866. 14 U. S. Statutes, 138.

We are not aware of any adjudications upon the construction of this section, but the question as to the proper construction of section 122, of the same act, which is very similar, has been often before the Courts, and several times before this Court. Attention is respectfully called to the discussion of this subject in our brief, in *Stockdale vs. Crescent City Railroad Co.*, No. 270, which is hereto annexed to avoid repetition of the argument herein. What is there said is greatly strengthened, by comparison of section 120 with section 122. The language of section 120 is "That there shall be levied and collected a tax of five per centum *on all dividends* in scrip or money thereafter declared due, * * *. as part of the earnings, income, or gains of any bank, trust company, savings' institution, and of any fire, marine, life, inland insurance company," etc. etc. It also requires the banks, insurance companies, etc., to pay the tax, and authorizes them to withhold the same from payments of dividends, etc.

Section 122 enacts that any railroad company, etc., indebted for money, represented by bonds, etc., upon which interest is to be paid; or any such Company that may have declared any dividend, shall be subject to pay a tax of five per centum thereon. Whatever doubt may be raised as to the construction of section 122, there certainly can be no construction which will warrant the theory that section 120 imposed the tax upon the corporations named.

II.

The tax upon incomes imposed by the act of June 30, 1864, *as amended, expired by limitation the thirty-first day of December*, 1869.

The argument in support of this proposition is to be found in our brief in No. 270, p. hereto annexed, to which we again respectfully ask a reference.

In this case the dividend was declared out of the earnings of the Company from July 5, 1869, to June 30, 1870. If the Court shall sustain our propositions as above the judgment must be affirmed; In any event, that portion of the earnings accrued during the year 1870, whether it be regarded as income of the individual, or income of the corporation, is not subject to any tax.

The assessment being erroneous in part, it is fatal to the whole. There can be no apportionment, or correction, by the Court.

By the assessment of a larger tax than is due, the whole assessment becomes void.

Clark vs. *Strickland*, 2 Curtis, C. C. R. 439.

Stetson vs. *Kempton et al.*, 13 Mass., 283.

Libby vs. *Burnham et al.*, 15 Mass. Rep. 144; 3 Cush. 569.

Union National Bank vs. *City of Chicago*, 3 Bissell, 82.

III.

There has been no legislation which could effect an extension of the time during which such tax could be imposed.

IV.

The constitutional rule requiring uniformity in excise taxes is violated by the act of July 14, 1870.

V.

1.—*Corporations had no authority to withhold tax from their dividends or interest, after the expiration of the act of June* 30, 1864.

2.—*Congress could not, after their payment of dividends or interest, without deduction of tax, retroactively subject the corporations to liability therefor.*

The argument in support of these propositions, is contained in our brief, in No. 270, hereto annexed,—commencing at p. et seq., whereto we now refer.

For these reasons the judgment of the Circuit Court should be affirmed.

Respectfully submitted.

J. D. ROUSE,
Attorney for Defendant in Error.

CHARLES CASE,
Counsel.

Supreme Court of United States.

No. 270.

SIDNEY A. STOCKDALE, Collector of Internal Revenue,
Plaintiff in Error,

VERSUS

THE CRESCENT CITY RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the District of Louisiana.

Brief for Defendant in Error.

This suit was brought by the defendant in error—plaintiff below—to recover certain sums of money paid to the plaintiff in error, collector of internal revenue, as taxes upon certain dividends declared by the Railroad Company and paid to its stockholders.

A jury was waived, and the facts agreed upon by the parties substantially as follows :

The Railroad Company is a corporation engaged in the business of transporting passengers for hire. Upon the twelfth day of January, 1870, it declared a dividend of its earnings for the year 1869, amounting to the sum of thirty thousand dollars, and again on the thirteenth day of July,

1870, declared a dividend from its earnings from the first day of February, to the 31st day of July, 1870, amounting also to the sum of thirty thousand dollars. Upon each of these dividends the assessor assessed an alleged tax of five per centum, amounting to the sum of fifteen hundred dollars in each case, and he also assessed the further sum of seventy-five dollars in each instance upon the amount of said tax. The Railroad Company paid each of said dividends in full to its stockholders, without any deduction on account of said tax, and denied any liability to make any return thereof to the assessor or to pay any tax to the collector thereon. The collector under threat of distraint, collected said assessments; the Railroad Company appealed to the Commissioner to refund the same, which appeals were rejected, and the Company brought suit within the time limited.

Upon these facts the Circuit Court gave judgment in favor of the Railroad Company.

We assert the correctness of that judgment, and in support thereof maintain the following propositions of law:

I.

The tax of five per centum imposed upon the dividends of Railroad Companies by Section 122 *of the act of June* 30, 1864, *as amended, is a tax upon the income of the Stockholder, and not a tax upon the Corporation.*

In this case the validity of the tax levied and collected is sought to be maintained under the provisions of section 122, act of June 30, 1864, as amended July 13, 1866.

14 U. S. Statutes, 138.

The question as to the proper construction of this section has been often before the Courts and several times before this Court. The latest decision of this Court upon this question affirms our proposition. In the case of *The United States vs. The Baltimore and Ohio Railroad Company*, decided April 7, 1873, (not yet reported) this Court after quoting from its previous decisions in the cases of *Jackson vs. Northern Central Railroad Company*, 7 Wall. 262, and *Haight vs. Pittsburg*, 6 Wall. 17, in affirmance of this proposition, said:

"This is a clear, distinct unqualified adjudication by the unanimous judgment of this Court, that the tax imposed by the 122d section is a tax imposed on the creditor or stockholder therein named; that the tax is not upon the corporation and that the corporation is made use of as a convenient and effective instrument for collecting the same. It is a sequence in logical connection, that provision of secon 117 which specifies as the subjects of individual taxation all the earnings, profits, gains and incomes, from whatever source derived, and whether divided or not *except* the amount derived from the sources indicated in the 122d section. Of the incomes specified in section 117 the individual must make specific returns and be directly taxed thereon. Upon or from the incomes received from the sources mentioned in section 122, no tax is directly imposed upon the owner. That tax is to be returned by and collected from the corporation as his agent or instrument. * * The corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. Whether the tax is five per cent. on the dividend or interest, or whether it be fifty per cent. the corporation is neither richer nor poorer. Whatever it thus pays to the government it by law withholds from the creditor. If no tax exists it pays seven per cent. or whatever be its rate of interest to its creditors in one un

broken sum. If there be a tax it pays exactly the same sum to its creditors less five per cent. thereof and this five per cent. it pays to the government. The receivers may be two or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed. * * If the tax were upon the Railroad there is no defence. It must be paid. But we hold that the tax imposed by the 122d section is in substance, and in law a tax upon the income of the creditor or stockholder, and not a tax upon the corporation."

This decision, it is true, was made under thes ection as it stood before its amendment, by the act of July 13th, 1866, but an analysis of that amendment will show that there is nothing in it which can affect this construction. A comparison of the original section in the act of June 30, 1864, 13 U. S. Statutes, 284, with the re-enactment of it July 13th, 1866, shows that no change whatever was made in the phraseology of that portion imposing the tax. That portion as amended reads as follows:

"That any railroad, canal, turnpike canal navigation, or slack-water company, indebted for any money for which bonds, or other evidences of indebtedness, have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, *including non.residents, whether citizens or aliens*, as part of the earnings, profits, increase, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever *and wherever* the same shall be payable, *and*

to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons, and dividends due and payable as aforesaid, the tax of five per centum, and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise." * * * *

The language is identical with the act of 1864, with the exception of the words in italics, which were inserted, and the word *tax*, wherever it occurs, was substituted for the word *duty*, in the original act. These italicised words are the same that were introduced by the amendment of March 2, 1866.

It is seen at once, that the effect of these amendments was to impose the tax upon "*non-residents, whether citizens or aliens.*" Similar provisions were, by the same act, incorporated into section 116, for the same purpose. The word "*wherever*" was introduced to cover payments beyond the limits of the United States. That this effect was the sole object and purpose of Congress, is plain, when we remember, that the Circuit Court in the *Northern Central Railroad Company vs. Jackson*, (S. C. Jackson vs. Railroad Company, 7 Wall. 262,) had just decided that the act of 1864 did not impose the tax upon *non-resident aliens.*

We are not ignorant of the ruling of a majority of this Court in *Barnes et al.* vs. *Philadelphia and Reading R. R.*

Co., decided March 3, 1873, where it said: "Different regulations for the assessment and collection of the income taxes of every kind were prescribed in the prior laws imposing internal revenue duties, * * * but they were not in all respects satisfactory, and many controversies had arisen. * * * "Congress accordingly, in order to remove these difficulties, imposed the tax upon the railroad companies." Again the Court said: "Such a dividend as that made by a railroad company is not required to be included in the return made by the shareholder of his gains, profits and income, but is expressly required by law to be retured by the president or treasurer of the railroad company as before explained, and the act of Congress in terms provides that the company shall be liable to and pay the tax, no matter when or where, or to whatsoever party or person the dividend may be payable. *Prior to that time the rule had been different*" etc.

With all due respect, we ask the Court to reconsider this question, and with the more confidence, because four of the members of this Court dissented from that opinion, and because, after a careful comparison of the original with the amended section 122, we are unable to see any foundation for the conclusion arrived at. We ask it to reconsider this ruling, because it denies all effect to the amendment. If this construction be correct, there was no necessity for introducing the words, "*including non-residents, whether citizens or aliens,*" and Congress did a vain thing by its amendment. We understand it to be a

rule of construction to give effect to an act, rather than to pronounce it an unnecessary piece of legislation.

We ask a reconsideration, because the conclusion is based upon the supposition that prior to the act of July 13, 1866, the railroad companies were not required to make return or pay the tax,—the language of the Court is, "prior to that time *the rule had been different*"—whereas the same requirements as to returns and payment of the tax by the railroad companies, (except that the payment was to be to the Commissioner,) and the same penalties for default in returning or paying the tax, are to be found in both acts. Stress seems to have been laid on the provision in section 116 of June 30, 1864, requiring the amount of dividends received from corporations to be included in the stockholders' income return, and its omission from the act of March 2, 1867. But as he was also authorized to deduct the tax thereon paid by the corporation, and withheld from him, from the amount otherwise due from him, its repeal simply dispensed with a useless formality.

We respectfully submit, that in view of the language imposing the tax being identical in both acts, the unanimous opinion of this Court in *Haight* vs. *Pittsburg* and *Jackson* vs. *Railroad Co.*, construing section 122 to impose a tax upon the recipients of dividends and interest, and not upon the corporation, requires the same construction to be placed upon the amended section; and no doubt this Court, upon more mature reflection, was of this opinion, when the decision in *The United States* vs. *Baltimore and Ohio R. R. Co.*, was rendered.

II.

The tax upon incomes imposed by the act of June 30, 1864, *as amended, expired by limitation the thirty-first day of December*, 1869.

The limitation is found in section 119 as amended March 2, 1867, 14 U. S. Stat. 480, which provides "that the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April in each year, until and including the year 1870, and no longer." It is elsewhere provided that the taxes so to be levied were to be levied upon the incomes "for the year ending the thirty-first day of December next preceding the time for levying, collecting and paying said tax." Therefore the last levying of such tax being for the year 1870, it was limited to income of 1869. Seetion 119 imposes no tax. The reference to taxes on income "herein imposed" must be applied to all the taxes on income, and the tax upon dividends and interest, being a tax upon income, could not be legally imposed upon such as were payable or earned after December 31, 1869. This fact was early recognized by the late Commissioner of Internal Revenue, as is evident from the language of his report, (1870) page 13. He says that as early as January 4, 1870, he "asked for legislation upon the subject." His recommendations are not before us, but the frequent repetition of his request, shows that he fully recognized, that without legislation, such tax could not be legally continued.

In this case both dividends were declared and payable

subsequent to the 1st of January, 1870, and were income for that year. If the Court shall sustain our first and second propositions, the judgment must be affirmed. But if the Court shall hold that the tax was imposed upon the Railroad Company and not upon the shareholder, still the tax is an income tax—a tax upon the income of the Railroad Company—and the second dividend, declared out of the income and earnings of said Company, which accrued to it between the 1st of February and the 31st of July, 1870, was not subject to any tax. Neither was there any sanction in law for the assessment and collection of a tax upon the tax assessed, as was done in this case.

III.

There has been no legislation which could effect an extension of the time during which such tax could be imposed.

The 17th section of the act of July 14, 1870, 16 U. S. Stat. 261, is the only enactment it is necessary to consider under this head. It provides "that sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three, of the act of June 30, 1864," as amended, "shall be *construed* to impose the taxes therein mentioned, to the first day of August, eighteen hundred and seventy."

This act is simply declaratory of the opinion of Congress, and not a re-enactment of the law itself. This very attempt to continue the law in force by *construction* is an admission that it had expired. The *construction* of statutes belongs, not to Congress but to the judiciary. If the law

were still in force, the judiciary would be bound to place upon it a construction given by Congress, and Congressional construction would have the effect of legislation, *after the passage of the act.* But Congress cannot construe statutes *retroactively.* In the United States vs. Dickson, 15 Peters, 162, Story, J., said: "It is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it, by the constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

In the case of Postmaster General vs. Early, 12 Wheaton, 136, Chief Justice Marshall laid down the rule that "A mistaken opinion of the Legislature concerning the law, does not make law. But if this mistake is manifested in words competent to make the law *in future*, we know of no principle which can deny them this effect. The Legislature may pass a declaratory act, which, though *inoperative on the past*, may act in future."

In Barrett vs. U. S., 2 Court of Claims Reports, 448, the statute under consideration was the third section of the act of March 3, 1867, to-wit: "That an act entitled an act to increase the pay of soldiers in the United States army, and for other purposes," approved June 20, 1864, shall not be so *construed* as to increase the emoluments of the commissioned officers of the army at the *date of its passage;*" and the court held that, "This clause of form

directs as to the construction of the act of 1864, *and to construe acts is the province of the judiciary.*" * *

"But it is also the duty of the judiciary to give to the acts of the Legislature their intended practical operation, as far as that is possible; and we think it clear that the Legislature intended to prevent the use of the statute of 1864, as a measure for computing the pay of officers' servants, and that the words of the clause cited are competent to effect that purpose, *from the date of its enactment.*"

In the schooner Aurora Borealis vs. Dobbie, 17 Ohio Rep., 125, the Court say: "It is the right of the Legislature to enact laws, and the province of the Court to construe them. The Legislature has no right to enact a law declaring what *construction* or decision the court shall make upon acts under which rights or liabilities have been acquired or accrued." * * * *

"The explanatory act operates prospectively, and has *from the time of its passage*, the force and effect of law. But so far as it assumes to encroach upon the province of the Court, and assumes to give *construction* to existing acts, to govern the decisions of the courts, as to cases pending, it is judicial; and as the constitution confers judicial power upon the courts, and withholds it from the Legislature, to that extent such acts will be inoperative. As a law such an act will be enforced; as a construction of previous acts, under which cases are already pending in the courts, it will be void." "These are fundamental principles about which there can be no question."

This and some of the following cases arose under State legislation, but the reasoning is equally applicable to acts of Congress.

"The right to make laws is vested in the General Assembly. The right to *decide* what the law *is* and what it *was* is vested in the Supreme Court." * * * "It is settled that the Legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts." Houston vs. Bogle, 10 Iredell, 505.

"The power of the Legislature is not judical. It is limited to the making of laws; not to the exposition or execution of them." McLeod et al. vs. Burroughs, 9 Geo. 213.

"The judiciary alone is to determine what the law is." * * * "The National Congress within the grant of powers to the general government, and the State legislatures, where not restrained by the federal or their own constitutions, may pass whatever laws they think proper; but it is still, as I have already remarked, the judiciary only which can settle what the law *is* or *has been*." Lafayette county ex rel. Knowlton, 2 Chandler Rep. (Wis.) 220.

The following cases also fully support this doctrine, viz: United States vs. Klein, 13 Wallace, 128, 147; Ogden vs. Blackledge, 2 Cranch, 272; Reiser vs. William Tell etc. Association, 39 Penn State Rep. 137; Atkinson vs. Dunlap, 50 Maine, 111; McDaniel vs. Cowell, 19 Ills. 226; Gordon vs. Ingraham, 1 Grant's Cases, 152; Stephenson vs.

Doe, 8 Blackf. 515; Kennett's Petition, 4 Foster, 139; Woart vs. Winnick, 3 N. H. 481; Clark vs. Clark, 10 N. H. 386; 18 Howard, 421; 16 Ohio Rep. 610; 5 Humph. 165.

Congress then, seeking to construe the law, exceeded its powers, and its action in this is void.

IV.

The constitutional rule requiring uniformity in excise taxes is violated by the act of July 14, 1870.

The first paragraph of section eight, article one of the Constitution of the United States provides, among other things, that, "All duties, imposts and excises shall be uniform throughout the United States."

We presume it will be conceded that the tax upon incomes is an excise tax, in the meaning of this article of the constitution. This court so decided in Pacific Insurance Company vs Soule, 7 Wall. 433. Section six of the act of July 14, 1870, imposes a tax upon incomes of *two and one-half* per centum for the years 1870 and 1871. Section seventeen of said act seeks to impose a tax of *five* per cent. upon income derived from the corporations enumerated in Secs. 120, 122 and 123 of the act of June 30, 1864, as amended, during the first seven months of the year 1870, the time so far as it extends, being identical with that during which a tax of two and one-half per centum is imposed upon all other incomes subject to tax. No argument is necessary to show that in this, the constitutional requirement of uniformity, is violated. One of the objects of the constitution being to "establish justice,"

the wisdom of the foregoing provision is apparent, when it becomes necessary to invoke it to protect A, whose fortune is invested in bank or railroad stocks, from being taxed upon his revenue therefrom double the amount that B is taxed upon his income, because he gathers it in the vortex of commerce. "Taxation by a *uniform rule* requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment." Gilman vs. City of Sheboygan, 2 Black. S. C. Rep. 517; Exchange Bank of Columbus vs. Hines, 3 Ohio St. Rep. 1; Knowlton vs. Supervisors, 9 Wis. 410; Sanderson vs. Cross, 10 Wis. 282; City of Zanesville vs. Richards, 5 O. S. 589; Paine vs. Wright, 6 McLean, 395.

Again, section seventeen of said act seeks to continue in force a tax of five per centum upon such incomes only as were derived from the corporations named in the sections which are sought to be revived. A simple statement of this proposition is sufficient; that the imposition of a tax upon incomes must be universal; that to impose such tax upon incomes derived from particular sources, and leave income from other sources untaxed, would be a violation of the rule of uniformity, required by the constitution.

The force of this proposition is not weakened, because exemption of a certain sum is permissible, but is rather strengthened by the fact that such exemption must also be uniform, and only reduce the sum upon which the tax shall be computed, without making any discrimination against individuals.

V.

1.—*Corporations had no authority to withhold tax from their dividends or interest, after the expiration of the act of June* 30, 1864.

2.—*Congress could not, after their payment of dividends or interest, without deduction for tax, retroactively subject the corporations to liability therefor.*

The law thus sought to be extended by legislative construction created the corporations whose dividends were taxed under it, the agents of the government for the collection of the tax. That agency expired with the law. It was only by virtue of the express authority conferred in the act that they could retain the tax upon payment of dividends and interest. When the law ceased to authorize the withholding of a per centage as a tax, the holders of shares and coupons had a right to demand and receive payment of their dividends and interest in full, and if any such per centage had been withheld would have had an immediate right of action therefor. To give effect to the act of July 14, 1870, and construe the expired statute to extend over the intervening time, would impose retroactively the liability of an agent upon these corporations, without the possibility of their fulfilling the duties thereof in withholding the tax from their dividend which had already been paid in full.

To compel them, under such circumstances, to pay such tax for their share or bondholders, would amount practically to confiscation. It will not do to say they might reimburse themselves by withholding the amount from

future dividends or interest. The negotiable character of railroads bond, and ready transfer of stocks, with the speculative mania at our great monetary centre, render it extremely improbable that more than a small proportion of shares or bonds would be in the same hands, when the next dividend or interest became payable.

Respectfully submitted.

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